

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JULIA K. DIAZ)	
Claimant)	
VS.)	
)	
GENERAL ELECTRIC COMPANY)	Docket No. 198,638
Respondent)	
AND)	
)	
ELECTRIC MUTUAL LIABILITY INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge John D. Clark on February 3, 1997. The Appeals Board heard oral arguments on July 15, 1997.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared on behalf of the claimant. John David Jurcyk of Lenexa, Kansas, appeared on behalf of the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award by the Administrative Law Judge. The Appeals Board has also considered the deposition testimony of J. Mark Melhorn, M.D., taken on February 27, 1997. The Appeals Board has adopted the stipulations listed in the Award.

ISSUES

In the application for review, respondent requested the decision in this case be reversed because the Administrative Law Judge decided the case without setting terminal dates and before receiving reports from two independent medical examinations he had ordered over respondent's objection and at respondent's expense. The record considered by the Administrative Law Judge also did not include the deposition of J. Mark Melhorn, M.D. This deposition was taken after the Award was entered.

In the application for review, respondent also listed as issues the nature and extent of claimant's disability, whether claimant met with personal injury by accident, whether claimant gave timely notice, and whether claimant is entitled to future medical expenses. At the time of oral argument, respondent's counsel indicated respondent no longer wishes to appeal issues relating to notice and future medical expense. Respondent does ask the Board to review the findings regarding whether the injury arose out of and in the course of employment on the dates alleged and the nature and extent of claimant's disability.

At the time of oral argument, claimant and respondent agreed that the deposition testimony of Dr. Melhorn may be considered in this case. Respondent and claimant also agreed that the Board proceed to determine this case, without remand, based upon a record which includes the evidence listed in the Award by the Administrative Law Judge and, in addition, the deposition testimony of J. Mark Melhorn, M.D. For reasons of expediency, respondent and claimant ask the Board to decide the case without reports or other evidence from the two independent medical examinations ordered by the Administrative Law Judge to be performed by Robert W. Rawcliffe, M.D., and Pedro Murati, M.D.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award by the Administrative Law Judge should be modified. The Administrative Law Judge awarded benefits for a 16 percent impairment at the shoulder. The Appeals Board finds claimant should be awarded benefits for an 8 percent permanent partial impairment at the level of the right shoulder.

Claimant, who had prior workers compensation claims for both the right and left upper extremities, testified she began having additional problems in her right arm and shoulder beginning about October 1994. She continued to work. She worked as a receiving clerk and her duties included lifting boxes weighing up to 50 pounds. Claimant testified that her symptoms worsened during the period of alleged injury between December 23, 1994, and January 31, 1995. Dr. Melhorn, who examined claimant for her prior injury, found additional permanent impairment and agreed that her work activities were a factor in causing this increase. The Appeals Board agrees with and affirms the

decision that claimant sustained additional permanent injury during the period December 23, 1994, through January 31, 1995.

The Appeals Board concludes, on the other hand, that the findings regarding nature and extent of disability should be modified. Three physicians gave deposition testimony regarding the nature and extent of claimant's injury. This includes Jay Stanley Jones, M.D., to whom claimant's counsel referred claimant. Dr. Jones was subsequently approved by the Administrative Law Judge as an authorized treating physician. Dr. Jones evaluated and rated claimant's impairment as 16 percent to the right upper extremity. He stated his impression was claimant suffers from chronic overuse syndrome with epicondylitis, possible early carpal tunnel syndrome, and impingement syndrome to the shoulder. His ratings include 5 percent for unoperated carpal tunnel, 5 percent for epicondylitis, and 6 percent for impingement syndrome. Dr. Jones testified that his impairment ratings were not related to preexisting conditions and that preexisting conditions were not aggravated.

George L. Lucas, M.D., saw the claimant on September 25, 1995, at the request of respondent. Dr. Lucas found impairment in the right shoulder only. He rated the impairment as an 8 percent impairment at the shoulder level. This was based upon his conclusion that claimant suffers from chronic rotator cuff tendonitis. He ruled out epicondylitis and carpal tunnel syndrome. He found no impairment of the wrist or elbow.

Dr. Melhorn rated claimant's impairment as 8 percent to the right upper extremity. His rating takes into consideration complaints in the right shoulder. Dr. Melhorn also testified that he considered Dr. Lucas' rating to be reasonable. Dr. Melhorn did not believe claimant suffered from rotator cuff tendonitis. Dr. Melhorn also testified that of his 8 percent, 4 percent would have been for injuries prior to the injuries alleged in this case and 4 percent due to these injuries. Dr. Melhorn treated claimant from July 14, 1992, for prior injuries, to January 10, 1997, for the current injuries.

As above indicated, the Appeals Board has concluded that claimant sustained an additional 8 percent permanent partial impairment from the injuries alleged in this claim. The Board arrived at this conclusion by giving approximate equal weight to the opinions of the three physicians. At the one extreme, Dr. Jones concludes claimant has a new 16 percent permanent partial impairment. He has given claimant the benefit of every doubt in giving ratings for the wrist and elbow levels as well as the shoulder. At the other extreme, Dr. Melhorn finds only an additional 4 percent impairment. Dr. Lucas finds 8 percent impairment to the shoulder only.

The Appeals Board concludes that claimant has a 12 percent permanent partial impairment at the shoulder level. This includes an impairment in the wrist and elbow areas. The Appeals Board also concludes that the work aggravated the preexisting condition to cause the injuries claimed here. The impairment rating must, therefore, be reduced by the amount of preexisting impairment in accordance with K.S.A. 44-501(c).

The Appeals Board finds, in accordance with the testimony of Dr. Melhorn, that claimant has a 4 percent preexisting impairment which, when deducted from the 12 percent, results in an 8 percent impairment. The Appeals Board awards benefits for an 8 percent permanent partial impairment at the shoulder or 225-week level.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated February 3, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Julia K. Diaz, and against the respondent, General Electric Company, and its insurance carrier, Electric Mutual Liability Insurance Company, for an accidental injury which occurred January 31, 1995, for 18 weeks at the rate of \$319 per week or \$5,742, for an 8% permanent partial disability at the shoulder level, all of which is presently due and owing less amounts previously paid.

The Appeals Board approves and adopts all other orders not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
John David Jurcyk, Lenexa, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director